Supreme Court, U.S.
FILED

011743 JAN 31 2002

OFFICE OF THE CLERK

No. _____

In The

SUPREME COURT OF THE UNITED STATES

SHERRY BATTLE,
Petitioner,

v.

LANDMARK COMMUNICATIONS, INC., ET AL,
Respondents.

On Petition For Writ Of Certiorari To The Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

Sherry Battle
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QUESTIONS PRESENTED

I. DID THE SUPREME COURT OF VIRGINIA COMMIT ERROR IN AFFIRMING THE TRIAL COURT'S FINDING THAT THE ARTICLE APPEARING IN THE VIRGINIAN-PILOT ON NOVEMBER 8, 1999 CONCERNING THE PETITIONER WAS NOT DEFAMATORY AND ACTIONABLE, WHEN READ IN CONTEXT WITH THE U.S. DISTRICT COURT'S ORDER OF OCTOBER 20,1999 AND ACCORDANCE WITH RULE 65 (d) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

II. IF SO, WAS RULE 65 (d) APPLICABLE TO THIS SUIT IN WHICH THE U.S. DISTRICT COURT ISSUED A DIRECTIVE OF A NONMONETARY NATURE UNDER RULE 11(c) (B) (2) OF THE FEDERAL RULES OF CIVIL PROCEDURE?

PARTIES BELOW

Sherry Battle , Plaintiff/ Appellant-Petitioner

The Virginian Pilot, A Division of Landmark Communication, Incorporated; Kay Tucker Addis, Editor; Marc Davis, Staff Writer, Defendant/ Appellees-Respondents Other Defendant/ Apellee below was: D.R. Carpenter III, President/ Publisher.

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RULES

Federal Rules of Civil Procedure, Rule 11 and Rule 65

TREATIES

Wright & Miller, Federal Practice & Procedure

OPINION BELOW

The opinion of the Supreme Court of Virginia appears at Appendix A to the petition is unpublished. (Sept. 17, 2001) (No. 15156), reh. denied, November 2, 2001.

STATEMENT OF JURISDICTION

This Honorable Court has jurisdidction to review the decision of the Supreme Court of Virginia by way of certiorari under 28 U.S.C. Section 1257 (a).

FEDERAL RULES OF CIVIL PROCEDURE PROVISIONS INVOLVED

Federal Rule of Civil Procedure 11 (c) provides ... the court may... impose an appropriate sanction upon attorneys, law firms or parties that have violated subdivision (b) or are responsible for the violation ...

Federal Rules of Civil Procedure Rule 11 (c) (B) (2) provides as follows:

Nature of Sanction; Limitations. A sanction imposed for violation of this rule shall be limited to what is sufficient to deter repetition of such conduct or comparable conduct by others similarly situated, Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court,or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a result of the violation.

Federal Rule of Civil Procedure 65 (d) provides:

Form and scope of Injunction or Restraining Order - Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; and is binding only upon the parties to the action, their officers, agents, servants, employees, and attorneys, and upon those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise.

STATEMENT OF THE CASE

In this suit, the petitioner, Sherry Battle, hereinafter referred to as Battle, contends that on November 8, 1999 the appellees, The Virginian-Pilot, D. R. Carpenter III, President/ Publisher, and Marc Davis, a staff writer, wrote, printed, published, circulated and distributed an article which contained defamatory statements about her in The Virginian -Pilot, a newspaper. Over 250,000 copies of this newspaper were circulated and distributed in the cities of Norfolk, Portsmouth, Chesapeake, Virginia Beach, Suffolk, portions of Isle Wright County and North Carolina.

The article published in The Virginian-Pilot contained the following defamatory statements about Battle:

1. "...the federal judge... ruled that Edmonds and his girlfriend, Sherry Battle, can not sue any other Virginia judge in the federal court without prior approval from a judge (Paragraph 13 of Motion for Judgment).
2. "... Edmonds represented Battle, sued Greenbrier

Mall and Grissom in federal court (Paragraph 14 of Motion For Judgment).

3. "... she sued the mall in Chesapeake Circuit Court , alleging racism (Paragraph 15 of Motion for Judgment).

4. " Battle and Edmonds then sued the mall and Grissom, accusing both of racism (Paragraph 16 of Motion Judgment).

5. " Edmonds asked for more time to reply, but Williams refused, calling the request' 'a typical ruse' by Battle and Edmonds throughout the history of the litigation to further harass Grissom (Paragraph 17 of Motion For Judgment).

6. " ORDER, also Luther C. Edmonds and his girlfriend cannot sue any other Virginia judge in federal court without prior approval from a federal judge (paragraph 18 of Motion For Judgment)."

Battle contends the above described statements were false and defamatory, since a plain reading of Judge Richard Williams' Order of October 20, 1999 shows the truth, and not what Marc Davis caused to be published in the The Virginian – Pilot on November 8, 1999. Battle contends, inter alia, that the publication of the defamatory statements adversely reflected on her abilities in her business, trade, or profession, as a business woman and bail bondsperson. (Paragraph 22 of Motion For Judgment).The appellees filed a demurrer to the Motion for Judgment filed by Battle on grounds as follows; (1) the Motion for Judgment fails to state a cause of action against the appellees because the statements complained of are not defamatory as a matter of law; (2) the Motion for Judgment fails to state a cause of action against the appellees because not all

of the statements are of and concerning the appellant; and (3) the Motion for Judgment fails to state a cause of action against appellees because no damages could be proved. The appellees further alleged that there is no actionable difference between an injunction being issued against a corporation and an injunction being issued against the corporation's president.

On March 16, 2001, Judge Edward W. Hanson, Jr., of the Circuit Court of the City of Virginia Beach heard arguments from the parties. The appellees argued essentially that Rule 65 (d) of the Federal Rules of Civil Procedure should govern the outcome of the case, because Judge Williams enjoined both the plaintiff and her counsel from filing any other federal lawsuits against Virginia state judges absent authority from a federal judge to do so (3-16-2001, Tr.). Rule 65 (d) provides that " Every order granting as injunction... is binding only upon the parties to the action, their officials, agents, servants...The appellees stated that the article which appeared in The Virginian-Pilot on November 8,1999, was not defamatory because the corporation was enjoined, including its officers, agents, servants and employees. (3-16-2001, Tr.7).The corporation can only act through the president and there is no actionable difference between the corporation, Elite Child, and, its President, Sherry Battle. Battle stated that her name was mentioned, in the article in question, in 5 out of 16 paragraphs of the article; however, the corporation, Elite Child, is not mentioned at all (3-16-2001, Tr. 11).

Battle asked the trial court to strike the demurrer because she had satisfied all the elements for a prima facie case of libel in Virginia (3- 16- 2001, Tr, 10-16).On October 20,1999,Judge Williams applied Rule 11 in entering his directive of anonmonetary nature against "both plaintiff (Elite Child,Inc.) and her counsel."

Judge Hanson found that " the article of November 8, 1999 as published in The Virginian- Pilot when read in the context with the Order of October 20, 1999, issued by Senior United States District Judge Richard Williams and in accordance with Rule 65 (d) Federal Rules, that the article is not defamatory (3-16-2001, Tr. 18)." On March 30, 2001, Judge Hanson entered an order which reflected his ruling.

Subsequently, Battle moved the trial court to modify its Order of March 30, 2001, arguing , essentially, that the order of October 20,1999 was not a preliminary or temporary injunction under Rule 65 (d) but a directive under Rule 11 of Federal Rules of Civil Procedure. The Court denied her motion by Order entered on April 5, 2001.

Battle filed a petition for appeal with Supreme Court of Virginia, and on September 17,2001, it was denied.

On October 1, 2001,Battle filed a petition for a rehearing and, on November 2, 2001, it denied the petition for rehearing

REASONS FOR GRANTING THE PETITION

In this suit, the Supreme Court Of Virginia had decided an important question of federal law or rule which has not been, but should be settled by the Supreme Court of the United States.

Battle argued that the appellees maliciously printed, published, circulated and distributed the article entitled," Edmonds sanctioned second time for frivolous lawsuit against a judge," which appeared in The Virginian- Pilot on November 8, 1999. The appellees contended that the above statements or language regarding Battle

were not defamatory (3-16-2001, Tr. 6,7). Battle contended that the statements in question adversely affect her reputation. This may occur from impeaching her honesty, integrity, virtue, sanity, or the like, See e.g., Warren v. Bank of Marion, 618 F.Supp. 317 (W. D. Va. 1985). Black's Law Dictionary states that libel is a malicious written or printed publication or to expose him to publication hatred, contempt, or redicule. Id. at 915." Accusation in writting or printing against the character of a person which affects his reputation, in that it tends to hold him up to ridicule, contempt, shame, disgrace, or obloquy, to degrade him in the estimation of the community, to induce an evil opinion of him in the minds of right thinking persons, to make him the object of reproach, to diminish his respectability or abridge his comforts... in society." Id.

At common law, defamatory words are actionable per se if they: 1. impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such office or employment, or 2. prejudice such person in his trade. Bull v. Logetronics, Inc., 323 F. Supp. 115 (E. D. Va 1971); See Shupe v. Rose's Stores, Inc., 213 Va. 374, 192 S.E. 2d 766 (1972),cert. denied 473 U.S. 905 (1985). Moreover, a written publication which affects one injuriously in his trade or calling and contains imputations against his honesty and integrity and which would, as it's natural and proximate consequence, occasion pecuniary loss constitutes a prima facie cause of action and is libelous per se, the right follows to such damages as must be presumed to proximately and necessarily result from such publication. Shryock v. Calkins & Co., 248 F. 649 (4th Cir. 1918).

In this suit, it is clear that Judge Williams did state in his Order of October 20, 1999 that Luther C. Edmonds and his girlfriend, Sherry Battle cannot sue any other Virginia judge in federal court without prior approval

from a federal judge (Emphasis supplied). Appellee, Marc Davis knew that the statement was false or had reckless disregard as to its truth or falsity. He made this statement with malice, as defined under New York Times v. Sullivan, 376 U.S. 254 (1964).

It is also clear that Judge Williams'Order of October 20, 1999 did not state that he had refused Edmonds' request for more time, calling the request' a typical ruse' being used by Battle and Edmonds throughout the history of the litigation to further harass (Judge) Grissom. " (Emphasis supplied) Marc Davis knew that the statement was false or had reckless disregard as to its truth or falsity. He made this statement with malice, as defined New York Times v. Sullivan, supra. The statements were defamatory per se because they ascribe to dishonesty, fraud, and deceitful acts, such as, Battle was guilty of lying and instituting vexatious litigation against Grissom. It is well settled that written statements that the plaintiff has been guilty of lying and instituting vexatious litigation are actionable per se. Mosley v. Moss, 47 Va. (6 Gratt.) 534(1850); Adams v. Lawson, 58 Va. (17 Gratt.) 250 (1867). Defamatory words are actionable per se at common law, if they: (1) impute to a person unfitness to perform the duties of an office or employment, or (2) prejudice such person in his trade or business. Bull v. Logetronics, Inc., supra. In this suit, the written publication of Marc Davis' article imputed that Battle lacked integrity in the discharge of her duties as
one of the owners in her retail clothing business. The publication to over 250,000 readers was defamatory and actionable per se. Furthermore, the written publication was injurious to the Battle's business because it contains imputations against her honesty and integrity and which have, as its natural and proximate consequence, caused pecuniary loss.

The threshold determination must be made by the trial judge on the question of whether there is substantial danger to reputation apparent from the content of a publication resembles the determination traditionally made by the court on the question whether a statement is libelous per se, Gazette, Inc. v. Harris 229 Va. 1, 23, 325 S. E. 2d 713, (1985), cert. den. 472 U.S. 1032 (1985). Viewing the circumstances objectively, the trial judge must determine whether a reasonable and prudent editor should have anticipated that the words used contained an imputation necessarily harmful to reputation. Id. The harmful potential of the words used in this suit, i.e., that Edmonds asked for more time to reply, but Williams refused, " calling the request' a typical ruse' being used by Battle and Edmonds throughout the history of the litigation to further harass (Judge) Grissom", should have been apparent to The Virginian-Pilot's editor, if he had exercised ordinary care.

It is the general rule that allegedly defamatory words are to be taken in their plain and natural meaning and to be understood by courts and juries as other people would understand them, and according to the sense in which they appear to have been used. Gazette, Inc. v. Harris, supra. In order to render words defamatory and actionable, it is not necessary that the defamatory charge be in direct terms but it may be made indirectly, and it matters not how artful or disguised the modes in which the meaning is concealed if it is in fact defamatory. Id. at 29 Accordingly, a defamatory charge may be made by inference, implication or insinuation. Id.

In Virginia, it is the jury function to determine which statements in a newspaper article are defamatory statements of facts about the plaintiff, taking into consideration the entire background of the case and the context in which those statements were made. Richmond Newspapers, Inc. v. Lipscomb, 234 Va. 277, 298-99, 362

S. E. 2d 32 (1987), cert. denied 486 U. S. 277 (1988). In this suit, the trial court sustaining the demurrer was premature, since it took the issue from the jury.

The appellees alleged that the appellant failed to state a cause of action against the appellees in her Motion for Judgment because not all of the statements are of and concerning plaintiff.

In this suit, Battle has alleged in five of sixteen paragraphs of the article in issue were c learly of or concerning her. The five paragraphs specifically identified her to over 250, 000 reasonable readers of The Virginian-Pilot.

In Virginia, a libel plaintiff must show that the alleged libel was published " of or concerning" him. Gazette, Inc. v. Harris, supra. He need not show that he was mentioned by name in the publication. Id. Instead, the plaintiff satisfies the " of or concerning " test if he shows that the publication was intended to refer to him and would be so understood by persons reading it who knew him. Id. In other words, the test is met if the plaintiff shows that the publication was " in its description or identification such as to lead those who knew the plaintiff to believe that the article was intended to refer [him]." Id. In this suit, the test is met because the publication of the article in issue was in its description or identification such as to lead those who knew of the petitioner, Sherry Battle, to believe that the article was intended to refer to her.

The appellees alleged that the Battle failed to state a cause of action against the appellees in her Motion for Judgment because no damages could be proved. Injury to the reputation of the plaintiff is presumed by law, if the statement is libelous and defamatory on its face. At common law, defamatory words are actionable per se, if they, inter alia, impute to a person's unfitness to perform the duties of an office or employment of profit, or want of

integrity in the discharge of the duties of an office or employment of profit and prejudice such person his or her profession or trade. Shupe v. Rose's Store, Inc., supra at 377. As heretofore stated, the publication of the article in issue contains libelous defamatory words, which are actionable per se, because they impute that Battle lacked integrity in the discharge of her duties in her business, Moreover, the publication of Battle contains imputations against her honesty and integrity. In this suit, no special damages need be proved since the libelous defamation falls within one of the four categories, characterized as slander per se at common law.

If proof of special damages was required, Battle was and is prepared to prove that she suffered pecuniary losses as a result of the defamatory publication upon proof by a preponderance of the evidence that the publication was false, or that the appellees, believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based. Gazette, Inc. v. Harris, supra at 16. Moreover, the appellees cited no authority to support their position that Battle had not been damaged. Appellees' Brief In Opposition to Petition For Appeal, pp., 6-8.

Battle was prepared to prove and satisfy the element of malice, as defined in New York Times v. Sullivan, supra, because Marc Davis had knowledge that the statements in the article in issue were false, or he had reckless discharge as to its truth or falsity.

II.

The decision of the Supreme Court of Virginia is inconsistant with the plain language and meaning of Rule 65 (d) and Rule 11 (c) (B) (2) of the Federal Rules of Civil Procedure.

It is well settled that a corporation is an artificial person, like the State. Peoples Pleasure Park Co. v. Rohleder, 109 Va.439, 446,61 S.E. 794, decree affirmed on rehearing, 109 Va. 439, 63 S.E. 591 (1909). It has a distinct existence or existence separate from that of its stockholders and directors. Id. In this suit, Elite Child's existence is separate from that of the petitioner, Sherry Battle. Sherry Battle is not the same as Elite Child, Inc.

The appellees contended that there was no actionable difference between an injunction being issued against a corporation and an injunction being issued against the corporation's president. However, the facts of this suit clearly show that Judge Williams' Order of October 20, 1999 enjoined "*both plaintiff (Elite Child, Inc.) and her counsel* from filing any other federal lawsuits against Virginia state court judges absent authority from a federal judge to do so." (Emphasis added).

The appellees contended that the Order of October 20, 1999, using the words "appellant and her counsel" meant that it was referring to Sherry Battle, as President of Elite Child, Inc. The appellees' position is incorrect, because Judge Williams' Order of January 14, 2000 has a contrary meaning. The plain language of his Order of January 14, 2000 attempting to clarify his Order of October 20, 1999 to mean that his Order " *Enjoins Elite Child, Inc., Ms. Sherry Battle in her personal capacity*... (Emphasis added). Thus, nearly three months after the article was published on November 8, 1999 in The Virginian- Pilot, Judge Williams determined that Sherry Battle was enjoined in her personal capacity, and not in her capacity as an officer or agent of Elite Child, Inc. Judge Williams'Order of clarification undoubtedly supports Battle's position that the Order of October 20, 1999 did not

enjoin Battle in any capacity. Judge Williams'.Order was issued in accordance with Rule II , which applies to attorneys, law firms and parties.Rules II (c). Hence, ***Battle was not a party when the appellees published the article on November 8, 1999.*** It is noteworthy that the article never mentioned Elite Child, Inc.On November 8,1999 the appellees knew that the statements were false or had reckless disregard as to its truth or falsity. Appellee, Marc Davis could not have known that Judge Williams was going to clearify his order three months later, January 14, 2000.

Rule 65 (d) of the Federal Rules of Procedure is not applicable to the facts of this suit, since Judge Williams issued a final directive of a nonmonetary nature, pursuant to Rule 11 (c) (B) (2) of the Federal Rules of Civil Procedure. See Wright & Miller, Vol. 5A, Fed. Practice & Procedure, Sec 1336.

A plain reading of Rule 65 (a) and (b) specifically refers to preliminary injunction and temporary restraining order and not a final directive like Judge Williams issued. Accordingly, Rule 65 (d) does not govern the scope of a directive of a nonmonetary nature under Rule 11 (c) (B) (2). Assuming that Judge Williams had issued an injunction, there is a distinction between a final injunction, preliminary and a temporary restraining order, as contained in Rule 65 (d). A final injunction is one granted when rights of the parties are determined. Black's Law Dictionary (Revised 4th Ed.) p. 923. A preliminary injunction is an injunction granted at the institution of a suit, to restrain the defendant from doing or continuing some act, the right to which is in dispute, and which may either be discharged or made perpetual, according to the result of the controversy,
as soon as the rights of the parties are determined. Id. A temporary injunction is defined a preliminary or

provisional injunction, or one granted pendente lite; as opposed to a final or perpetual. The appellees had provided no authority for their contention that Rule 65 (d) applies to a final injunction as well. Even so, no authority had been cited to show that it applies to a directive issued in accordance with Rule 11(c)(B) (2).

It was clear error for the Supreme Court of Virginia to affirm the trial court's decision resolving all issues in favor of the appellees by applying Rule 65 (d) of Fed. R. Civ. P. (3-16-2001, Tr. 18-19). While two of the alleged defamatory statements concerning Battle relate to Judge Williams' directive or Order of October 20,1999 four were not specifically related to the directive. (E.g., Motion for Judgment, paragraphs 14, & 17).

Battle had clearly proffered to the trial court sufficient facts to establish a prima facie case of libel against the appellees for a jury to decide.

Conclusion

For the foregoing reasons, petition for a writ of certiorari should be granted.

Respectfully submitted

Sherry Battle, Pro se

Sherry Battle
1016 Tradewinds Road
Virginia Beach, 23464
(757) 622-2112

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 2nd *day of* November, 2001.

Sherry Battle, Appellant,

against Record No. 011556
Circuit Court No. CL00-3092

Landmark Communications, Inc., et al., Appellees.

Upon a Petition for Rehearing

On consideration of the petition of the appellant to set aside the judgment rendered herein on the 17th day of September, 2001 and grant a rehearing thereof, the prayer of the said petition is denied.

A Copy,

Teste:

Clerk

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Monday *the* 17th *day of* September, 2001.

Sherry Battle, Appellant,

against Record No. 011556
Circuit Court No. CL00-3092

Landmark Communications Inc., et al., Appellees.

From the Circuit Court of the City of Virginia Beach

Upon review of the record in this case and consideration of the argument submitted in support of and in opposition to the granting of an appeal, the Court is of opinion there is no reversible error in the judgment complained of. Accordingly, the Court refuses the petition for appeal.

A Copy,

Teste:

David B. Beach, Clerk

By: Deputy Clerk

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

SHERRY BATTLE,

Plaintiff,

v. CASE NO. CL00-3092

LANDMARK COMMUNICATIONS, INC.,
et al.,

Defendants.

ORDER

THIS DAY came the parties upon the Demurrer filed by the defendants and upon the memorandum and arguments presented.

WHEREUPON, after due consideration, the Court finds from a reading of the newspaper article and the Order of the United States District Court for the Eastern District of Virginia attached as Exhibit B to the Motion for Judgment in light of Rule 65(d) of the Federal Rules of Civil Procedure that the article in question is not defamatory and actionable. Accordingly, the Demurrer is GRANTED as to Count 1 with leave granted to the plaintiff to file an Amended Motion for Judgment on or before April 6, 2001.

The Court further finds that the Motion for Judgment does not state a claim for invasion of privacy recognized under the law of Virginia and therefore, the Demurrer is SUSTAINED as to Count 2 of the Motion for Judgment without leave to amend.

The reasons for the Court's order and the details thereof are more particularly set forth in the transcript of the proceedings dated March 16, 2001 which is made a part hereof and incorporated

herein by this reference. To all of which action of the Court, the plaintiff duly objected and excepted for the grounds stated in argument and raised in her memorandum.

ENTER: 3-30-01

EWH

JUDGE

I ASK FOR THIS:

Brett A Spain

Conrad M. Shumadine
Brett A. Spain
Counsel for Defendants

Certified to be a TRUE COPY
of record in my custody
J. Curtis Fruit, Clerk
Circuit Court, Virginia Beach, Va
BY: Deputy Clerk

SEEN AND OBJECTED TO:

Sherry Battle, *pro se*
Plaintiff

App 5

VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH

MAY 2 5 2001

SHERRY BATTLE,

Plaintiff,

v. At Law No. CL00-3092

LANDMARK COMMUNICATIONS, INC., *et al.*,

Defendants.

ORDER

THE COURT previously sustained the Demurrer filed by defendants and granted plaintiff leave to file an amended motion for judgment as to Count One of the Motion for Judgment on or before April 6, 2001. Plaintiff did not file an amended motion for judgment within the time specified, but instead moved the Court to modify its Order entered on March 16, 2001, and the Court denied this Motion by Order entered on April 5, 2001.

NOW, THEREFORE, the Court ADJUDGES, ORDERS and DECREES that this action be and the same hereby is DISMISSED with prejudice.

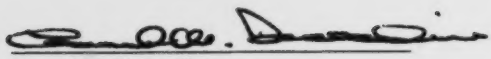
ENTER: _____

Edward W. Hanson, Jr.
Judge, Virginia Beach Circuit Court

Certified to be a TRUE COPY
of record in my custody.
J. Curtis Frult, Clerk
Circuit Court, Virginia Beach, VA
BY: Katherine McCall
Deputy Clerk

I-372803.1
5/24/01

WE ASK FOR THIS:



Conrad M. Shumadine
Brett A. Spain
Counsel for Defendants

SEEN AND OBJECTED TO:

_____

Sherry Battle, *pro se*
Plaintiff